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SUPREME COURT FINDS CONTROL AND DEPENDENCY WILL DETERMINE IF AN EMPLOYMENT RELATIONSHIP EXISTS

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On May 22, 2014, the Supreme Court of Canada issued a significant employment law decision in *McCormick v. Fasken Martineau DuMoulin LLP*. In this case, the Court found that an equity partner of a law firm was not an employee for the purposes of the British Columbia *Human Rights Code*. However, the Court also stated that there could be situations where a partner would be considered an employee.

Significantly, in coming to this conclusion, the Court refocused the numerous tests used by statutory decision-makers for determining whether an employment relationship exists. The Court found that at their core, all of these tests were ultimately concerned with determining the degree of control and dependency that characterized the relationship.

Although this decision was an appeal from a decision of the British Columbia Human Rights Tribunal, the Supreme Court's ruling in this case is applicable to all Canadian employers, regardless of jurisdiction. In addition, this decision will be of particular interest to partnerships and professional service firms that may have the "non-equity" or tax partner category in their partnership.

In this *FTR Now* we examine the Supreme Court's decision and its implications for employers.

BACKGROUND FACTS

John McCormick, an equity partner with Fasken Martineau DuMoulin LLP ("Fasken" or the "Firm"), filed a human rights complaint in British Columbia ("B.C.") against the Firm in 2009. In his complaint, Mr. McCormick alleged that the mandatory retirement provisions of the Firm's Partnership

Agreement were discriminatory. The Partnership Agreement provided that at the end of the year in which a partner turned 65, he or she was required to retire as an equity partner and divest their ownership shares in the partnership.

Interestingly, as Mr. McCormick had been an equity partner since 1979, he had the opportunity to vote on this provision when it was adopted in the 1980s. However, he did not raise any concerns with respect to the mandatory retirement provisions until he reached age 64 in 2009.

THE HUMAN RIGHTS TRIBUNAL AND LOWER COURT DECISIONS

At the B.C. Human Rights Tribunal, Fasken argued that the Tribunal was without jurisdiction to hear the application because as an equity partner, Mr. McCormick was not an employee. The Tribunal applied a four factor test – utilization, control, financial burden and remedial purpose – to the relationship between Mr. McCormick and Fasken, and found that he was an employee. This decision was upheld by the B.C. Supreme Court on judicial review.

Fasken then appealed to the B.C. Court of Appeal, which overturned the decision. The Court of Appeal's decision was based on the proposition that because a partnership is not a separate legal entity, a partner could never be an employee. Mr. McCormick appealed this decision to the Supreme Court of Canada.

THE SUPREME COURT OF CANADA'S DECISION

THE NEW TEST: CONTROL AND DEPENDENCY

Courts and statutory decision-makers have developed numerous tests to determine whether an employment relationship exists. Writing on behalf of a unanimous court, Justice Abella reasoned that ultimately all of these various tests were assessing two key factors – control and dependency. Accordingly, the Supreme Court set out the following test to determine if an employment relationship exists:

- Who is responsible for determining working conditions and financial benefits?
- To what extent does a worker have an influential say in those determinations?

The more control exercised over an individual's workplace life, the greater the individual's dependency and therefore, the more vulnerable they will be in

the workplace. The Supreme Court stated that the tests developed by courts and statutory decision-makers should continue to be applied, but in a manner that will answer the questions of control and dependency.

APPLICATION TO THE FACTS

The Court began by applying this test to the concept of partnerships in a general sense. Justice Abella noted that unlike a corporation, partnerships are traditionally considered to be a collection of partners rather than a distinct legal entity. Further, the Court found that partners generally have a right to participate meaningfully in decision-making processes that affect their workplace terms and conditions, including remuneration. A partner's ability to control the workplace was reinforced by the provisions of the B.C. *Partnerships Act*. Accordingly, the Court found that in most situations a partner would not be an employee, but a member of the collective employer.

However, the Court went on to find that this determination should not be made simply on form but on substance, i.e. there could be situations where a partner would be considered an employee. Accordingly, decision-makers must engage in a contextual analysis in order to determine whether an employment relationship exists.

Applying the control and dependency test to the facts of this case, the Court relied on the following facts to determine that Mr. McCormick was not an employee:

- Fasken's administrative rules and utilization of management and compensation committees did not limit a partner's autonomy. As all of these groups were directly or indirectly accountable to and controlled by the partnership.
- The Partnership Agreement provided that most major decisions, including the adoption of the mandatory retirement provisions, were subject to a vote of the full partnership.
- Equity partners like Mr. McCormick benefited from other control mechanisms including voting and election rights, the right to his share of the firm's capital account upon leaving the partnership, the right not to be disciplined or dismissed and protection from expulsion.
- Mr. McCormick was a full and equal member of the partnership. He had an equal say and was entitled to vote on the policy he was now challenging.
- Mr. McCormick's remuneration came exclusively from the partnership, but represented his share of the profits of the partnership in accordance

> with his ownership interest. As an owner, Mr. McCormick was not working for the benefit of someone else, but for his own benefit.

Accordingly, the Court found that as an equity partner, Mr. McCormick was part of the group that controlled the partnership, not a person vulnerable to its control. Further, as an equity partner, Mr. McCormick had an ownership interest in the Firm and therefore was not dependent on Fasken in any meaningful way.

Finally, the Court noted that under the B.C. *Partnerships Act* partners are required to act with the "utmost fairness and good faith towards other members of the firm in the business of the firm." The Court questioned if this duty could provide a remedy to partners claiming discrimination, but as it was not necessary to decide the issue, the Court left this question to be determined in a future case.

IMPLICATIONS OF THE DECISION

With this decision, the Supreme Court effectively refocused the various tests for determining when an employment relationship will exist and created a new simplified test of control and dependency. Although the Supreme Court has couched the test in terms of human rights legislation, the underlying principles would have a broader application to other legislative regimes, as well as the common law. As such, this decision is applicable to **all** Canadian employers, regardless of industry or jurisdiction.

DIFFERENCES BETWEEN ONTARIO AND BC LAW?

As the statutory schemes in Ontario and B.C. include some notable differences, the question arises as to how this case might have been decided differently if it had arisen in Ontario. First, the Court's *obiter* comments with respect to a partner's duty of good faith would have no application in Ontario, as the Ontario *Partnerships Act* does not contain this type of provision.

Second, the employment provisions of the Ontario *Human Rights Code* (the "*Code*") have been interpreted more broadly than the B.C. provisions. However, this more expansive interpretation would seem more likely to apply to situations where there is a blurred line between whether an individual is a contractor or an employee, or in the case of unionized workplaces, in order to allow the union to be named as a respondent. Ultimately, the indicia of control and dependency would still need to be satisfied in those cases, before a conclusion that an employment relationship exists is made. Even an

expanded definition of “employment relationship” in the Ontario *Code* could not be reasonably applied to find that equity partners are employees.

Finally, it is also possible that an applicant in Ontario would try to rely on the contracting provisions of the *Code*, rather than the employment provisions. This section of the *Code* states that individuals have the right to contract on equal terms without discrimination based on a prohibited ground. While this approach would avoid the question of whether an equity partner is an employee, it does not appear that a *prima facie* case of discrimination could be made out on this basis. A *prima facie* case of discrimination requires evidence of differential treatment based on a prohibited ground of discrimination. As such, discrimination is essentially a comparative analysis.

In this case, there was no differential treatment. Mr. McCormick was subject to the same treatment as every other equity partner. All equity partners at Fasken were subject to mandatory retirement at age 65. Further, not only had Mr. McCormick been entitled to vote on the policy when it was adopted, he had profited from the policy without complaint for approximately 20 years. Accordingly there was no differential treatment and therefore, no discrimination.

IMPLICATIONS AND TIPS FOR DEALING WITH NON-EQUITY PARTNERS

Another significant aspect of this decision is the Court’s comments that there could be situations where a partner would be considered an employee. The area where this risk appears to be the most obvious is with respect to “non-equity” or tax partners.

While various arrangements exist, one typical situation is where an individual is called a “partner” to the outside world, but does not enjoy all of the benefits of partnership within the firm. For example, non-equity partners may not have voting rights, may not have invested capital in the firm and do not receive a share of the firm’s profits.

These arrangements are potentially troublesome in light of the *McCormick* decision, because it is these very factors which led the Court to conclude that Mr. McCormick was not an employee of Fasken. In order to protect themselves from a finding that an employment relationship exists, firms that have non-equity partners, or are considering introducing this form of partnership should consider the following:

- Voting rights – can non-equity partners attend partnership meetings and receive an equal vote on partnership issues, particularly those relating to

the conditions and remuneration in the workplace? This will increase the amount of control and influence a non-equity partner has over their working conditions.

- Share of profits – can non-equity partners receive a share of profits such that there is a risk of profit and loss? This will decrease the relative dependency of the non-equity partner on the firm.

While these suggestions remain untested, it would appear that non-equity partnerships could be the next battleground in defining the scope of "employment relationships." As such, any steps partnerships and professional service firms can take to protect against a finding that a non-equity partner is an employee would be highly recommended.

If you would like further information about this decision, or have any other employment-related inquiry, please contact Jeffrey Goodman at 416.864.7038, Stephanie Jeronimo at 416.864.7350 or your regular Hicks Morley lawyer.

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